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No. 80-493

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES DEPARTMENT OF EDUCATION,
Petitioner,

v.

SEATTLE UNIVERSITY,
Respondent.

On Appeal from the Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER OF AMERICAN CIVIL LIBERTIES UNION WOMEN'S RIGHTS PROJECT, CENTER FOR NATIONAL POLICY REVIEW, DISPLACED HOMEMAKERS NETWORK, INC., FEDERATION OF ORGANIZATIONS FOR PROFESSIONAL WOMEN, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN, NATIONAL EDUCATION ASSOCIATION, NOW LEGAL DEFENSE

[Additional Amici Curiae listed on inside cover]

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

American Civil Liberties Union Women's Rights Project, Center for National Policy Review, Displaced Homemakers Network, Inc., Federation of Organizations for Professional Women, League of Women Voters of the United States, Mexican American Legal Defense and Education Fund, National Association of Commissions for Women, National Education Association, NOW Legal Defense and Education Fund, National Student Education Fund, National Women's Political Caucus, Organization of Chinese American Women, Rural American Women, Southern Coalition for Educational Equity, Women Employed, Women's Equity Action League, Women's Equity Action League Educational and Legal Defense Fund, Women's Legal Defense Fund, Wider

Opportunities for Women, Inc., and United States Student Association respectfully move, pursuant to Rule 42 of this Court's Rules, to file the within brief *amici curiae* in *United States Department of Education* v. *Seattle University* in support of the petitioner United States Department of Education. Counsel for petitioner, U.S. Department of Education, has consented to the filing of this brief. The respondent, Seattle University, has instructed its attorneys to file a motion to withdraw as counsel and to take no further action in this case. Counsel for Seattle University has informed us that in light of this motion, counsel for the respondent neither consents nor fails to consent to the filing of this brief.

These organizations share a concern that individuals be free to participate in all facets of American life without discrimination on the basis of gender. Central to the effort to secure equal rights for women is the establishment of an educational system which is itself free from gender-based bias. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX") is one of the most important tools available to combat sex discrimination in educational institutions. To exclude employment discrimination from its scope would be to eliminate a critical means for securing sex equity in schools, adversely affecting both employees and students alike.

Because of these organizations' long-standing work towards the elimination of gender discrimination, they believe their brief will be of substantial assistance to the Court in the resolution of the issues raised by this case. In particular, their brief will not restate the analysis of the statute, legislative history and case law to be presented by the petitioner, but rather will focus upon the special concerns of Congress in addressing gender-based employment discrimination in schools in 1972 in contrast to its perception of the problem in earlier years, the importance of Title IX coverage of employment discrimina-

tion, and the broad array of federal funds which benefit employees of educational institutions.

Respectfully submitted,

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SUBJECT INDEX

	Page
Interest of *amici curiae*	2
Summary of argument	2
Argument	4
I. In 1972 Congress expanded the prohibitions against sex discrimination in employment by educational institutions	4
II. The failure of Congress to include in Title IX the Title VI exemption of employment discrimination reflects its intention to prohibit employment discrimination *per se* not only in Title VII but also in Title IX	12
III. Federal financial assistance flows both to students and employees	17
Conclusion	22

TABLE OF AUTHORITIES

CASES — Page

Alexander v. *Gardner-Denver*, 415 U.S. 36 (1974) .. 13
Alpha Portland Cement Co. v. *Reese*, 507 F.2d 607 (5th Cir. 1975) 13
Bob Jones University v. *Johnson*, 396 F.Supp. 597 (D.S.C. 1974), *aff'd per curiam*, 529 F.2d 514 (4th Cir. 1975) 20
Cannon v. *University of Chicago*, 99 S.Ct. 1946 (1979) 17
Dougherty County School System v. *Harris*, 622 F.2d 735 (5th Cir. 1980), *petition for cert. docketed*, 49 U.S.L.W. 3495 (Jan. 13, 1980) 2, 18
F.T.C. v. *Cement Institute Co.*, 333 U.S. 683 (1948) 13, 14
F.T.C. v. *Motion Picture Advertising*, 344 U.S. 392 (1953) 14
Grove City College v. *Harris*, No. 78-1293 (W.D. Pa., June 26, 1980), appeal pending Nos. 80-2383 and 2384 21
International Union of Electric Radio & Machine Workers v. *Robbins & Myers*, 429 U.S. 229 (1976) 13
Islesboro School Committee v. *Califano*, 593 F.2d 424 (1st Cir. 1979), *cert. denied*, 100 S.Ct. 467 (1979) 2, 12, 14, 17
Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) 13
Junior College District of St. Louis v. *Califano*, 597 F.2d 119 (8th Cir. 1979), *cert. denied*, 100 S.Ct. 467 (1979) 2, 12, 14
Macklin v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973) 13
North Haven Board of Education v. *Hufstedler*, 629 F.2d 773 (2d Cir. 1980), *petition for cert. docketed*, 49 U.S.L.W. 3467 (Jan. 6, 1981) 2, 15, 17, 19
Piva v. *Xerox*, 376 F.Supp. 242 (N.D. Cal. 1974) .. 13
Romeo Community Schools v. *HEW*, 600 F.2d 581 (6th Cir. 1978), *cert. denied*, 444 U.S. 972 (1979) 2, 12, 14, 16, 17

TABLE OF AUTHORITIES—Continued

Page

United States v. *El Camino Community College District*, 600 F.2d 1258 (9th Cir. 1979), *cert. denied*, 100 S.Ct. 661 (1980) 11

United States v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (8th Cir. 1967), *cert. denied sub nom., Caddo Parish School Board* v. *United States*, 389 U.S. 840 (1967) 11

United States Department of Education v. *Seattle University*, 621 F.2d 992 (9th Cir. 1980) 2

Warner Lambert Co. v. *FTC*, 361 F.Supp. 948 (D.D.C. 1973) 14

STATUTES

Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000g 4

Title VI, 42 U.S.C. § 2000d *et seq.* 3, 4, 5, 11, 12
Title VI, 42 U.S.C. § 2000d-3 4
Title VII, 42 U.S.C. § 2000e *et seq.* 3-6, 12-17, 22
Title VII, 42 U.S.C. § 2000e-1 ..... 4, 5
Title VII, 42 U.S.C. § 2000e-5(f) 16

Clayton Act, 15 U.S.C. § 12 *et seq.* 13
Education Amendments of 1972

Title VII, 20 U.S.C. § 1601 *et seq.* 18
Title IX, 20 U.S.C. § 1681 *et seq.* .....*passim*

Section 906(b)(1) 5

Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-1 .....5, 7, 11
Emergency School Aid Act, former 20 U.S.C. § 1601 *et seq.*, current 20 U.S.C. § 3191 *et seq.*.... 18
Equal Pay Act of 1963, 29 U.S.C. § 206(d)..5, 15, 16, 22
Fair Labor Standards Act of 1938, § 13(a), 29 U.S.C. § 213(a) 5
Federal Mine Safety and Health Act of 1977, § 105(c), 30 U.S.C. § 815(c)(1) 14

TABLE OF AUTHORITIES—Continued

	Page
Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*	13, 14
Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.*	14
National Labor Relations Act, Section 8, 29 U.S.C. § 158	14
Sherman Act, 15 U.S.C. §§ 1-7	13, 14
Pub. Law 92-261, Section 2(1), 1972, 86 Stat. 103	5
Pub. Law 92-261, Section 3, 1972, 86 Stat. 103	5
Pub. Law 92-318, Title IV, 1972, 86 Stat. 248	21
Pub. Law 92-318, Title VII, Section 707, 1972, 86 Stat. 359	18
Pub. Law 92-318, Title IX, Section 906(b)(1), 1972, 86 Stat. 375	5
Pub. Law 95-561, Title VI, Section 602(b)(2), 1978, 92 Stat. 2252	18
Pub. Law 95-561, Title VI, Section 617(b)(2), 1978, 92 Stat. 2268	18
20 U.S.C. § 237	19
20 U.S.C. § 238	19
20 U.S.C. § 241-1	19
20 U.S.C. § 1601 *et seq.* (1970) (Supp. V 1975)	18
20 U.S.C. § 1606 (1970) (Supp. V 1975)	18
20 U.S.C. § 3192 (1976) (Supp. III 1979)	18
20 U.S.C. § 3197 (1976) (Supp. III 1979)	18
38 U.S.C. § 1651 *et seq.*	20
42 U.S.C. § 2000e(a) (1970) (Supp. V 1975)	5

EXECUTIVE ORDERS AND REGULATIONS

Executive Order 11246, 30 Fed. Reg. 12319 (1965) *as amended by* Executive Order 11375, 32 Fed. Reg. 14303 (1967), *reprinted in* 42 U.S.C. § 2000e (1970)	16, 17
Executive Order 12250, 45 Fed. Reg. 72995 (Nov. 4, 1980)	20
34 C.F.R. § 106.2(g)	16
41 C.F.R. § 60-1 *et seq.*	16
44 Fed. Reg. 14320 (Apr. 25, 1979)	20

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS	Page
H.R. REP. No. 353, 92d Cong., 1st Sess. (1971)	7
H.R. REP. No. 554, 92d Cong., 2d Sess. (1972)	20
S. REP. No. 92-415, 92d Cong., 1st Sess. (1971)	7, 11
Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor, 91st Cong., 2d Sess. (Part 1) (1970)	7, 8
Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor, 91st Cong., 2d Sess. (Part 2) (1970)	7, 9
Hearings on Sex Discrimination and Sex Stereotyping in Vocational Education Before the Subcomm. on Elementary, Secondary and Vocational Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. (1975)	10
118 CONG. REC. 1992 (1972)	6

OTHER MATERIALS	
Carnegie Commission on Higher Education, *Opportunities for Women in Higher Education*, McGraw-Hill, Hightstown, N.J. (1973)	9
Catalogue of Federal Education Assistance Programs, Office of Education, U.S. Dept. of HEW, U.S. Government Printing Office (1974)	19, 20
Catalogue of Federal Domestic Assistance, Executive Office of the President, Office of Management and Budget, U.S. Government Printing Office, Washington, D.C. (1979)	21
Council on the Economic Status of Women, *Minnesota Women in Education*, St. Paul Minn. (1979)	9, 10, 11
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TABLE OF AUTHORITIES—Continued

Page

National Advisory Council on Women's Educational Programs, *Toward Educational Equity: A Report of Findings From Outreach Activities During 1976*, U.S. Government Printing Office (1976) 9

Pennsylvania Commission on Women, *Vocational Education and Apprenticeship Training for Women in Pennsylvania* (1978) 9, 11

Safilios-Rothschild, C., *Sex Role Socialization and Sex Discrimination: A Synthesis and Critique of the Literature*, N.I.E., U.S. Department of HEW, Washington, D.C. (1979) 9

Murray, P., *Economic and Educational Inequality Based on Sex: An Overview*, 5 VAL. U. L. REV. 237 (1971) 8

Tidball, M.E., *Of Men and Research*, 47 JOURNAL OF HIGHER EDUCATION 373 (1976) 10

Tidball, M.E., *The Search for Talented Women*, 6 CHANGE 51 (1974) 10

Tidball, M.E., *Women's Colleges and Women Achievers Revisited*, 5 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 504 (1980).. 10

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BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

OF AMERICAN CIVIL LIBERTIES UNION WOMEN'S RIGHTS PROJECT, CENTER FOR NATIONAL POLICY REVIEW, DISPLACED HOMEMAKERS NETWORK, INC., FEDERATION OF ORGANIZATIONS FOR PROFESSIONAL WOMEN, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN, NATIONAL EDUCATION ASSOCIATION, NOW LEGAL DEFENSE AND EDUCATION FUND, NATIONAL STUDENT EDUCATION FUND, NATIONAL WOMEN'S POLITICAL CAUCUS, ORGANIZATION OF CHINESE AMERICAN WOMEN, RURAL AMERICAN WOMEN, SOUTHERN COALITION FOR EDUCATIONAL EQUITY, WOMEN EMPLOYED, WOMEN'S EQUITY ACTION LEAGUE, WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL AND LEGAL DEFENSE FUND, WOMEN'S LEGAL DEFENSE FUND, WIDER OPPORTUNITIES FOR WOMEN, INC., AND UNITED STATES STUDENT ASSOCIATION

INTEREST OF *AMICI*

The interest of *amici* appears from the foregoing motion.

SUMMARY OF ARGUMENT

The instant case presents the issue of whether Title IX prohibits sex discrimination in the employment policies and practices of educational institutions receiving federal financal assistance. The United States Court of Appeals for the Ninth Circuit below held that employment discrimination *per se* is not prohibited by Title IX. *United States Department of Education* v. *Seattle University*, 621 F.2d 992 (9th Cir. 1980).[1] Some other circuit courts have agreed. *Romeo Community Schools* v. *HEW*, 600 F.2d 581 (6th Cir. 1978), *cert. denied*, 444 U.S. 972 (1979); *Isleboro School Committee* v. *Califano*, 593 F.2d 424 (1st Cir. 1979), *cert. denied*, 100 S.Ct. 467 (1979) and *Junior College District of St. Louis* v. *Califano*, 597 F.2d 119 (8th Cir. 1979), *cert. denied*, 100 S.Ct. 467 (1979). However, *North Haven Board of Education* v. *Hufstedler*, 629 F.2d 773 (2d Cir. 1980), *petition for cert. docketed*, 49 U.S.L.W. 3467 (Jan. 6, 1981), and *Dougherty County School System* v. *Harris*, 622 F.2d 735 (5th Cir. 1980), *petition for cert. docketed*, 49 U.S.L.W. 3495 (Jan. 13, 1981) hold that employment practices of federal aid recipients can be covered.

In this brief, *amici* will not restate the analysis of the statute, legislative history and case law presented by the petitioner United States Department of Education. Rather, *amici* will focus upon the particular concern Congress had with regard to gender-based employment dis-

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[1] The Court did not find, however, that employment discrimination could not be reached to the extent that a showing of adverse impact on students is shown, or to the extent that the employment discrimination takes place in a program receiving federal funds whose primary purpose is to support employment.

crimination by schools when enacting Title IX as contrasted to the approach to employment discrimination taken by the Congress in 1964 when it enacted Title VI.[2] Its better understanding of the problems of employment discrimination in general, as well as the particularly serious adverse consequences of sex discrimination in employment by schools, led the Congress in 1972 to adopt a broader approach to remedy the problems of employment discrimination than it had taken in 1964. Hence, as *amici* discuss below, even though Congress expressly modeled Title IX after Title VI, it intended to enact a broader Title IX prohibition against employment discrimination in schools, and purposely omitted the Title VI employment exclusion in order to secure that additional protection.

Moreover, by including coverage of employment practices and policies in Title IX, Congress added an important remedy to combat problems of sex discrimination in schools—a remedy which included the enforcement capabilities of the Office for Civil Rights, then in the Department of Health, Education and Welfare[3] as well as the remedy of federal fund termination which is not available under Title VII. Given the broad-based federal financial assistance benefiting both students and employees, this additional Title IX remedy is particularly appropriate and important.

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[2] Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d *et seq.* (1970) ("Title VI").

[3] Chief responsibility for Title IX enforcement is now lodged in the Department of Education. Moreover, other federal agencies which provide educational funding have Title IX enforcement responsibilities including the Department of Defense and the Department of Agriculture.

ARGUMENT

I. IN 1972 CONGRESS EXPANDED THE PROHIBITIONS AGAINST SEX DISCRIMINATION IN EMPLOYMENT BY EDUCATIONAL INSTITUTIONS

With the Civil Rights Act of 1964,[4] Congress passed sweeping legislation addressing the problems of discrimination in this country. Included in the legislation was Title VI, prohibiting discrimination on the basis of race or national origin in programs or activities receiving federal financial assistance, and Title VII,[5] prohibiting employment discrimination on the basis of race, sex, national origin or religion.

As beginning efforts, these laws had limitations in their scope and coverage. Title VII, for example, did not apply to educational activities of educational institutions or to public employees.[6] As a result, teachers and school administrators at all levels were denied Title VII protection against employment discrimination on the basis of race, sex, national origin or religion. Consistent with this limitation, Congress excluded employment discrimination from coverage under Title VI.[7] These legislative exemptions reflected a cautious approach as Congress entered a new sphere of regulation.

By 1972, Congress had gained substantial experience and additional information concerning the nature of employment discrimination in general and in schools in particular. Moreover, it had the opportunity to review the operation of Title VI and Title VII, and to reach conclusions about their limitations as originally drafted.

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[4] Pub. L. No. 88-352, 42 U.S.C. §§ 2000a-2000g (1970).

[5] 78 Stat. 253, 42 U.S.C. § 2000e *et seq.* (1970).

[6] 42 U.S.C. § 2000e-1 (1970).

[7] 42 U.S.C. § 2000d-3 (1970).

As a result of this review, Congress addressed the problems of sex discrimination in educational institutions in a sweeping manner, both as it affected students and employees. Congress amended Title VII to remove the exclusion of coverage for educational activities of educational institutions;[8] amended the Equal Pay Act of 1963[9] to remove the exemption of professional employees including teachers;[10] and passed Title IX which on its face broadly prohibits sex discrimination of any type[11] in educational institutions receiving federal funds.

The concern with employment discrimination in schools was a theme repeatedly expressed by the Congress. As Senator Williams[12] stated during the Congressional debate on the Equal Employment Opportunity Act of 1972:

> "The existence of discrimination in the employment practices of our Nation's educational institutions is well known, and has been adequately demonstrated by overwhelming statistical evidence as well as numerous complaints from groups and individuals. Minorities and women continue to be subject to blatant discrimination in these institutions.

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[8] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 42 U.S.C. § 2000e-1 (1970) (Supp. V 1975). In this Act, Congress also removed an exemption for public employers affecting public schools as employers among others. Pub. L. No. 92-261, § 2(1), 86 Stat. 103, 42 U.S.C. § 2000e(a) (1970) (Supp. V 1975).

[9] 29 U.S.C. § 206(d) (1970).

[10] Education Amendments of 1972, Pub. L. No. 92-318, Title IX, § 906(b)(1), 86 Stat. 375, amending § 13(a) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a), so that the Equal Pay Act would apply to teachers and administrative personnel in schools.

[11] The statute contains limited exceptions, but none exempt employment from coverage in contrast to the employment exemption in Title VI.

[12] Senator Williams sponsored the amendment and was floor manager of the debate.

As regards minorities, statistical studies show that minorities are generally underrepresented in teaching positions in educational institutions, and those that are employed are relegated to the lower paying and less prestigious positions. . . .

Perhaps the most extensive discrimination in educational institutions, however, is found in the treatment of women. While women are generally well represented statistically in terms of numbers employed, they are generally relegated to the lowest paying and least prestigious jobs. Women account for the majority of teachers in elementary and secondary schools but they are virtually totally excluded from positions as principals and other administrative or decisionmaking positions.

In institutions of higher education women are almost totally absent in the position of academic dean, and are grossly underrepresented in all other major faculty positions. Also, I would add, that the discrimination does not only exist as regards to the acquiring of jobs, but that it is similarly prevalent in the area of salaries and promotions where studies have shown a well-established pattern of unlawful wage differentials and discriminatory promotion policies." (emphasis supplied).

118 CONG. REC. 1992 (1972) (Remarks of Sen. Williams).

Similarly, the Report of the House Committee on Education and Labor, in explaining its version of the Title VII Amendments, stated:

"The committee feels that discrimination in educational institutions is especially critical. The committee cannot imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. *To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination.*" (emphasis supplied).

H.R. REP. No. 353, 92d Cong., 1st Sess. 20 (1971). The Senate Report made similar conclusions. S. REP. No. 92-415, 92d Cong., 1st Sess. 11-12 (1971).

Congress' greater understanding of the problems of employment discrimination as it exists in educational institutions had as a basis the testimony presented in hearings preceding the enactment of Title IX and the Equal Employment Opportunity Act of 1972. The underrepresentation of women in American college and university faculties was well-documented in the hearings. Women were least often found in the sciences and engineering faculties and, when they were present in the faculty, women were clustered in the lower ranks and in positions outside the promotional ladders leading to academic tenure.[13] Women rarely held the administrative positions of academic dean, provost, president, chancellor or the lesser positions leading to these posts.[14]

Further, the particular and special importance of employment discriminaiton in schools was underscored. When Title IX was under consideration by the Congress in 1971, Dr. Pauli Murray reported that:

> "A more far-reaching result for which colleges and universities are directly responsible is the continued

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[13] *See, e.g., Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (Part 1) 301 (1970) (Prepared Statement of Dr. Bernice Sandler) [hereinafter cited as 1970 House Hearings (Part 1)], and *id.* at 338 (Prepared Statement of Dr. Pauli Murray), and *id.* at 453 (Testimony of Virginia R. Allen) and *id.* at 591 (Prepared Statement of Women's Rights Committee of New York University School of Law); Loeb, Report on the University of Illinois Urbana-Champaign, Ill. in *Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (Part 2) 1225 (1970) [hereinafter cited as 1970 House Hearings (Part 2)].

[14] *See, e.g.*, Sandler, Sex Discrimination at the University of Maryland, in 1970 House Hearings (Part 2), *supra* note 13, at 1024-1029; 1970 House Hearings (Part 1), *supra* note 13, at 301 (Prepared Statement of Dr. Bernice Sandler).

lack of 'role models' to encourage younger women to raise their goals and expectations and the perpetuation of the stereo-type that women are not a good academic investment. As the report on women at Columbia University pointed out:

> We are puzzled by the Graduate Faculties' commitment to train women, but not to hire them. We know from experience as students and teachers that it is vital for women students in graduate school to see women engaged in the academic profession as naturally as men are . . . . By the obvious scarcity of women training graduate students, the institution acclimatizes women students to their professional expectations: low rank, low pay, low status, a slower rate of promotion than their male colleagues, and a more difficult tenure hurdle.

Similarly, the report on women at Harvard University noted that the scarcity of women scholars in the senior ranks at Harvard tends to discourage the professional aspirations of women students and junior faculty. Thus, the self-fulfilling prophecy continues to operate. 'Since women have a visibly lower chance of success than men,' said Dr. Scott, 'fewer women are inspired to try, lowering in turn the numbers of women available' for academic positions." [footnotes omitted]

Murray, P., *Economic and Educational Inequality Based on Sex; An Overview*, 5 VAL. U. L. REV. 237 (1971) at 269-70. At the 1970 Congressional Hearings on Discrimination Against Women, the serious and varied negative ramifications for female students of discrimination against faculty women were highlighted in the submissions and statements of several individuals who were university faculty or administrators or social scientists.[15]

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[15] *See, e.g.*, Scott, *The Half-Eaten Apple: A Look at Sex Discrimination in the Univ.*, REPORTER, May 14, 1970, *reprinted in* 1970 House Hearings (Part 1) *supra*, note 13, at 147; 1970 House

Later studies have served to reinforce these earlier findings, and the conclusions Congress reached in 1972. It is well accepted that the availability of and access to role models has an influence on career choice by individuals. C. Safilios-Rothschild, *Sex Role Socialization and Sex Discrimination: A Synthesis and Critique of the Literature*, N.I.E., U.S. Department of HEW, Washington, D.C. (1979) at 79-80. Several national and state bodies have recognized the need for female role models for women students. *See, e.g.*, Carnegie Commission on Higher Education, *Opportunities for Women in Higher Education*, McGraw-Hill, Hightstown, N.J. (1973) at 68; National Advisory Council on Women's Educational Programs, *Equity for the Eighties: Fifth Annual Report*, U.S. Government Printing Office (1980) at 18 and *Toward Educational Equity: A Report of Findings From Outreach Activities During 1976*, U.S. Government Printing Office (1976) at 4; Council on the Economic Status of Women, *Minnesota Women in Education*, St. Paul, Minn. (1979) at 15; Pennsylvania Commission for Women, *Vocational Education and Apprenticeship Training of Women in Pennsylvania* (1978) at ii.

In 1973, the Carnegie Commission on Higher Education noted that undergraduate women could be discouraged from enrolling in traditionally male fields because the absence of women faculty there conveyed the impression that women could not succeed in the field. It also recognized the low level of support offered by male faculty in prestigious research-oriented institutions to females seeking training in their fields. *Opportunities for Women in Higher Education, supra* at 68. The Carnegie Commis-

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Hearings (Part 2) *supra*, note 13, at 1081 (letter to Chairman Green, dated July 12, 1970, with encl. from Sheila Tobias); *id.* at 1091-1093 (Prepared Statement of Helen B. Schleman); Rossi, Alice, *Status of Women in Graduate Departments of Sociology 1968-69*, 5 THE AM. SOCIOLOGIST (Feb. 1970), *reprinted in* 1970 House Hearings (Part 2) *supra*, 1242 at 1251-52.

sion endorsed changes in faculty employment practices that are premised on the special connection between employment practices and the level of educational opportunity offered to women students. *Id.* at 4.

In her study of women career achievers, Dr. M. Elizabeth Tidball found a high, statistically significant dependence between the presence of career-successful women on the faculty of colleges and universities and the rate with which those institutions produced women with high career achievement. Tidball, M.E., *Women's Colleges and Women Achievers Revisited*, 5 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 504 (1980) at 508. *See also* Tidball, M.E., *Of Men and Research*, 47 JOURNAL OF HIGHER EDUCATION 373 (1976) at 386-387; and Tidball, M.E., *The Search for Talented Women*, 6 CHANGE 51-52, 64 (1974).

At the secondary and postsecondary levels, the dynamics of role models are much the same for women in vocational education programs as they are for those in an academic degree program. The majority of women students have historically been enrolled in only three of the major areas of vocational training offered by schools: office work, health services and home economics. The better-paying areas—technical, trade, and industrial courses and agriculture—are dominated by male instructors and male students. *Hearings on Sex Discrimination and Sex Stereotyping in Vocational Education Before the Subcomm. on Elementary, Secondary and Vocational Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975) 2-13 (testimony of Dr. Marilyn Steele) and *id.* at 102-114 (prepared statement of Pamela Ann Roby). The importance of moving women into teaching positions in these fields and into vocational education administration has been noted at Congressional hearings, *id.* at 109, and in the recommendations of several commissions and councils. *See, e.g., Minnesota Women &*

Education, supra at 11-16, 25-26. One of the major recommendations of the Pennsylvania Commission for Women's Task Force on Vocational Education and Apprenticeship Training was for an increase in the number of women in decision-making positions in vocational education, both to provide leadership vital to reducing sex-stereotyped programs and to serve as role models for the women and girls training in the area. *Vocational Education and Apprenticeship Training of Women in Pennsylvania, supra* at ii.[16]

In sum, the same Congress which enacted Title IX also declared its increased awareness of the problems of discrimination in employment, and the particularly serious problem of sex discrimination in employment by educational institutions. As the Senate Report on the Equal Employment Opportunity Act of 1972 explained, "it has been demonstrated that employment discrimination is even more pervasive and tenacious than Congress had assumed it to be at the time it passed the Act [Title VII]." S. REP. No. 92-415, 92d Cong., 1st Sess. 4 (1971). It is against this backdrop that the passage of Title IX, and the elimination of the Title VI exclusion of employment discrimination, must be read.

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[16] Of course, where the connection is shown between employment discrimination and discrimination against students, such discrimination can be addressed as discrimination against students even under Title VI where employment discrimination was specifically exempted from coverage. *See, e.g.*, United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied sub nom.* Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967); United States v. El Camino Community College District, 600 F.2d 1258 (9th Cir. 1979), *cert. denied*, 100 S.Ct. 661 (1980).

II. THE FAILURE OF CONGRESS TO INCLUDE IN TITLE IX THE TITLE VI EXEMPTION OF EMPLOYMENT DISCRIMINATION REFLECTS ITS INTENTION TO PROHIBIT EMPLOYMENT DISCRIMINATION *PER SE* NOT ONLY IN TITLE VII BUT ALSO IN TITLE IX

The Court below, and others holding that employment discrimination *per se* is not covered under Title IX [17] have viewed the amendment of Title VII to include educational institutions as the exclusive remedy available to address problems of sex discrimination in employment by schools. These cases hold that even though Title VII was amended to include educational institutions, and even though Congress thereafter enacted Title IX without an employment discrimination exemption, a Title VI-like employment exemption must be read into the statute.

However, for Congress to prohibit employment discrimination in schools, as it did when it amended Title VII, yet retain an employment exemption when it then enacted Title IX, is contrary to Congress' consistent approach in dealing with problems of employment discrimination. Congress has repeatedly responded to the range and complexity of employment discrimination by enacting independent statutes vesting the courts and governmental agencies with overlapping power to enforce their legislative objectives. Rather than limiting coverage, Congress has consistently expanded employment discrimination prohibitions through numerous avenues.

It has been well established by the courts that Title VII is not the exclusive remedy for unlawful employment practices, and that there are varied sources of relief available. The Supreme Court has expressly recognized

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[17] *See* Romeo Community Schools v. U.S. Depart. of HEW, *supra;* Isleboro School Comm. v. Califano, *supra;* Junior College Dist. of St. Louis v. Califano, *supra.*

Congress' approach of overlapping remedies in *Alexander* v. *Gardner-Denver*, 415 U.S. 36, 47-49 (1974):

> [L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination . . . . [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

See also Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *International Union of Electrical, Radio & Machine Workers* v. *Robbins & Myers*, 429 U.S. 229 (1976); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 996 (D.C. Cir. 1973); *Alpha Portland Cement Co.* v. *Reese*, 507 F.2d 607, 610 (5th Cir. 1975); *Piva* v. *Xerox*, 376 F.Supp. 242, 246 (N.D. Cal. 1974).

Further, the enactment of overlapping remedies is not unique to the area of employment discrimination. Congress has frequently permitted simultaneous use of different proceedings for relief. For example, in the antitrust area the Federal Trade Commission Act (FTCA) [18] was designed by Congress to supplement and bolster the Sherman Act [19] and the Clayton Act.[20]

In *F.T.C.* v. *Cement Institute Co.*, 333 U.S. 683 (1948), the Supreme Court explained that the Sherman Act and the FTCA were designed to provide the government with cumulative remedies against activities detrimental to fair competition. Congress proposed to enforce the Sherman Act through the Justice Department and to

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[18] 15 U.S.C. § 41 *et seq.* (1970).

[19] 15 U.S.C. §§ 1-7 (1970).

[20] 15 U.S.C. § 12 *et seq.* (1970).

supplement that enforcement through the administrative process of the FTC. The FTC was not envisioned as a rival, but as an aid to the Sherman Act. *F.T.C.* v. *Cement Institute Co., supra,* at 694-95. *See also, F.T.C.* v. *Motion Picture Advertising,* 344 U.S. 392, 394 (1953).

Similarly, the Federal Trade Commission and the Food and Drug Administration share overlapping jurisdiction in the prevention of deceptive drug labeling. The FTCA has provisions for the FTC to prevent unfair and deceptive labeling practices. The Food, Drug and Cosmetic Act [21] enables the Food and Drug Administration to review drug labeling and ensure the accuracy of the information. In *Warner Lambert Co.* v. *FTC,* 361 F. Supp. 948, 952-953 (D.D.C. 1973), the court held that concurrent proceedings by both agencies were proper and that the statutory remedies of the two are cumulative and not mutually exclusive.[22]

Moreover, given the particular focus of and remedies under Title IX, its coverage of employment discrimination is particularly important. The court in *Isleboro Sch. Comm.* v. *Califano, supra,* at 430, upon which both the Sixth Circuit in *Romeo* and the Eighth Circuit in *Junior College* rely, erroneously assumed that the issue of Title IX coverage was a question of "largely academic interest" because Title VII was amended to prohibit the particular employment practices complained of in that case. This assumption highlights the First Circuit's misperception of the importance of Title IX employment coverage, and may explain why the court did not understand

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[21] 21 U.S.C. § 301 *et seq.* (1970).

[22] *See also,* section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1) (1976) (Supp. III 1979) and Section 8 of the National Labor Relations Act, 29 U.S.C. § 158 (1970), which provide overlapping remedies for the protection of miners' safety and health activities.

Congress' intention to include employment within the scope of Title IX. Similarly, the *Romeo* court views the Title VII remedies as "superior" to those of Title IX. *Romeo Community Schools* v. *U.S. Department of HEW*, *supra* at 584.

In fact, however, unlike the Equal Pay Act and Title VII, Title IX is directed toward the federal government's responsibility to assure that federal funds are not used to aid or abet unlawful sex discrimination. With employment discrimination covered under Title IX, employees receive the extra protection which accompanies a sanction not available under Title VII or the Equal Pay Act—that of federal fund termination if the employment discrimination is not stopped. Clearly the prospect of losing federal funding can provide at least as great an incentive to a school to eliminate its discriminatory employment policies and practices as the chance that an employee might seek individual remedies through a Title VII or Equal Pay Act case. *See North Haven Board of Education* v. *Hufstedler*, *supra* at 784-785.

Further, the coverage of employment discrimination under Title IX brings with it the benefits of a governmental enforcement scheme which runs parallel to those designed to enforce Title VII and the Equal Pay Act. The Office for Civil Rights, which has special expertise with respect to schools, is available to respond to discrimination complaints, and to conduct its own investigations of compliance. Moreover, given the special interrelationship between employment and student discrimination in schools, it is particularly beneficial for the Office for Civil Rights to have the authority to review both together, or aspects of each as it determines is necessary or appropriate.

The special importance of assuring that federal funds are not used in a discriminatory manner is the basis as

well for Executive Order 11246,[23] which prohibits employment discrimination by any employers receiving federal contracts. The program for enforcement of this Order, delegated to the U.S. Department of Labor and funded by Congress, uses fund termination as its basic remedy when conciliation fails. 41 C.F.R. § 60-1 *et seq.* The Executive Order enforcement purpose is similar to the Department of Education's Title IX enforcement goal—to assure that federal funds are used in a nondiscriminatory manner. Just as the Executive Order prohibitions against employment discrimination are neither of only academic interest, nor inferior in importance to those of Title VII and the Equal Pay Act, so too the employment discrimination prohibitions of Title IX are of great significance.

Moreover, as Congress was aware in 1972, the Executive Order applies only to federal contracts, unlike Title IX which also applies to grants and loans. 34 C.F.R. § 106.2(g). Therefore, as a practical matter, the Executive Order has virtually no application to elementary and secondary schools which receive vast grants, but not contracts, from the federal government. Title IX's coverage of employment extends to elementary and secondary schools the fund-termination remedy and a federal enforcement scheme which applies to virtually all other major employers through the Executive Order program.[24]

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[23] 30 Fed. Reg. 12319 (1965) *as amended by* Exec. Order No. 11375, 32 Fed. Reg. 14303 (1967), *reprinted in* 42 U.S.C. § 2000e (1970).

[24] Moreover, the court enforcement powers of the Equal Employment Opportunity Commission ("EEOC") do not extend to public employees. 42 U.S.C. § 2000e-5(f)(1970)(Supp. III 1973). Thus, for the public school teacher or principal and the faculty and administration in public, postsecondary institutions, if conciliation of a complaint fails, unless the case is referred by EEOC to the Justice Department and pursued by that agency, these employees will have to pursue their rights as private plaintiffs, often a tremendously costly undertaking. The resources of the

As the Supreme Court stated in *Cannon* v. *University of Chicago*, 99 S.Ct. 1946, 1965 (1979), when addressing the issue of whether Title IX includes a private right of action:

> The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section.

III. FEDERAL FINANCIAL ASSISTANCE FLOWS BOTH TO STUDENTS AND EMPLOYEES

A further argument advanced as to why Title IX does not prohibit employment discrimination is that Congress could not have intended the severe sanction of fund termination to apply where employment discrimination was shown. *Romeo Community Schools* v. *HEW*, *supra* at 584. The cases also hold that employees are not beneficiaries of federal financial assistance to educational institutions. *Romeo Community Schools* v. *HEW*, *supra*, at 584; *Isleboro Sch. Comm.* v. *Califano*, *supra*, at 426. This reasoning not only ignores the seriousness with which the 1972 Congress viewed employment discrimination in schools, *see North Haven Board of Education* v. *Hufstedler*, *supra*, at 785, but also ignores the nature of much of the federal financial assistance flowing to schools, which directly benefits employees as well as students.

Justice Department's Civil Rights Division unit for fair employment litigation are far less extensive than those available to EEOC for this purpose, which places most teachers at a clear disadvantage in comparison to employees in the private sector. Private sector employees have, for the most part, both the Title VII options with the potential of EEOC undertaking litigation and the remedies offered by the Department of Labor's Executive Order 11246 enforcement program. *See* discussion, *supra* at 15-16. Title IX employment coverage helps to fill this gap.

As the most simple example, there is express statutory language which identifies teachers as well as students as intended beneficiaries of federal funds. *See, e.g.*, Education Amendments of 1972, Pub. L. No. 92-318, Title VII, 20 U.S.C. § 1601 *et seq.* (1970) (Supp. V 1975). Indeed, the stated purpose of this legislation, enacted at the same time Title IX became law, is:

> "(1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students *and faculty in elementary and secondary schools;* . . . ." (emphasis supplied)

20 U.S.C. § 1601(b)(2) (1970) (Supp. V 1975). Activities authorized by this statute include training and retraining of staff and the recruiting, hiring and training of teacher aides. 20 U.S.C. §§ 1606(a)(2), (3) and (4) (1970) (Supp. V 1975).[25] Therefore, at the very time Congress enacted Title IX, it also enacted educational funding statutes with the express purpose of aiding faculty as well as students.

However, the federal funding benefiting employees in schools is far more extensive than special purpose funding statutes such as the ones discussed above. The Fifth Circuit in *Dougherty County School System* v. *Harris*, *supra* at 738, recognizes that in fact teacher salaries may be paid by a federally funded program, regardless of whether teachers are expressly termed beneficiaries, and

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[25] In 1978, these provisions were repealed effective September 30, 1979. Pub. L. No. 95-561, Title VI, § 617(b)(2), 92 Stat. 2268, but the relevant section of the purpose clause relied upon by *amici*, 20 U.S.C. § 1601(b)(2) (1970) (Supp. V 1975), was reenacted in Pub. L. No. 95-561, Title VI, § 602(b)(2)(1978), and is now codified at 20 U.S.C. § 3192(b)(1)(1976)(Supp. III 1979). Authorized activities continue to include programs specifically for the teaching staff. *See* 20 U.S.C. § 3197 (1976) (Supp. III 1979), which replaced § 707 of the 1972 enactment of the Emergency School Aid Act, Pub. L. No. 92-318, Title VII, § 707, 20 U.S.C. § 1606 (1970)(Supp. V 1975).

that in such cases employment discrimination on the basis of sex is prohibited under Title IX.

Moreover, schools also receive vast amounts of virtually unrestricted federal funds which benefit both employees and students, and flow through the educational institution. *North Haven Board of Education* v. *Hufstedler, supra* at 785-786. For example, Congress provides funds on a formula basis for elementary and secondary school districts which serve children residing on federal property, children whose parents work on federal property or are on active duty in the uniformed services, and children whose parents are refugees. The statute also offers assistance to local educational agencies in those communities where the tax base has been reduced by substantial acquisition of real property. 20 U.S.C. §§ 237-238 (1970). This program, commonly known as Impact Aid, and solidly in place before Title IX was passed, assisted 4,800 school districts in FY 1972.[26] No restrictions are placed on these funds once they are received by the local educational agency.

The Impact Aid program also provides construction assistance support for minimum school facilities where substantial increases in school membership have been caused by federal activities or where reconstruction of facilities is necessitated by a national disaster. 20 U.S.C. § 241-1 (1970). In 1972, over $25,000,000 was obligated under this program.[27]

At the postsecondary level, the federal government has provided increasing resources for undergraduate and

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[26] During FY 1972, grants of $592,580,000 were obligated. *Catalogue of Federal Education Assistance Programs*, Office of Education, U.S. Department of HEW, U.S. Government Printing Office, 1974 at 149.

[27] *Catalogue of Federal Education Assistance Programs, supra*, note 26, at 148.

graduate student support. Several of these programs provide grants and/or loans to students needing funds to pay tuition and fees or for basic support during the absence from the work force occasioned by their studies. In 1970-1972, the period during which Title IX was under consideration by the Congress, there were several active higher education grant mechanisms. The oldest was the Veterans' Educational Assistance program, 38 U.S.C. § 1651 *et seq.* (1970) administered by the Veterans' Administration, which provides funds to individuals who have completed military service or had their education interrupted by active duty.[28] Over $1.5 billion was obligated in FY 1971 under this program. *Catalogue of Federal Education Assistance Programs, supra,* note 26, at 313. By offering tuition payments and stipends to ex-members of the armed forces, the federal government substantially increases the pool of applicants to colleges and universities and enables those institutions at which veterans enroll to concentrate their own financial aid resources on other students. *Bob Jones University* v. *Johnson,* 396 F.Supp. 597 (D.S.C. 1974), *aff'd per curiam,* 529 F.2d 514 (4th Cir. 1975).

In 1965, the Higher Education Act established the Educational Opportunity Grants program ("EOGs") to provide funds for undergraduate students with exceptional financial need. Grants of up to $1,000 or one-half of the amounts provided to the students from other institutional financial aid per year, whichever was less, were possible for up to four years of study.[29] The Education Amend-

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[28] The Veterans' Administration has also issued proposed Title IX regulations, 44 Fed. Reg. 24320 (April 25, 1979) as required by statute. Executive Order 12250 assigns responsibility for coordinating enforcement of Title IX *inter alia,* to the Attorney General. 45 Fed. Reg. 72995 (Nov. 4, 1980).

[29] In fiscal year 1971, an estimated 290,000 students at 2,100 institutions received EOG assistance. H.R. REP. NO. 554, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & ADM. NEWS, 92d Cong., 2d Sess. 2477.

ments of 1972 replaced the EOG program with a two-part grant system, Basic Educational Opportunity Grants ("BEOGs") and Supplemental Educational Opportunity Grants ("SEOGs"), Pub. L. No. 92-318, Title IV, Part A, 86 Stat. 248, [1972] U.S. CODE CONG. & AD. NEWS, 92d Cong., 2d Sess. 293-302. Both laws provide grants to students with limited financial resources.[30] These funds, as was true with the EOG grants, can be used by students to pay their tuition or student fees.[31]

To the extent that these federal funds from the Veterans' Administration and from the Department of Education are used to pay tuition and fees charged the student, universities use those funds to fill their general funding needs. The funds flow into the unrestricted fund categories of the university accounts and can then be used by the institution for any purpose its chooses—faculty salaries, new facilities, library books, heating fuel or any other acceptable expenditure for a college or university.

In sum, large amounts of federal funds are provided to elementary and secondary schools and higher education

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[30] These funds, available for eligible students in sums based upon Congressional appropriations, have been held to be federal financial assistance to a college sufficient to obligate it under the Department of Education Title IX regulation which requires recipients to file an assurance of compliance with Title IX prior to receipt of such funds. Grove City College v. Harris, No. 78-1293 (W.D. Pa. June 26, 1980), appeal pending, Nos. 80-2383, 2384.

[31] Today the BEOG program is enormous. In fiscal year 1979 over $2.3 billion was obligated in grants under the BEOG program. During the 1978-79 award period an estimated 1,800,000 students enrolled in about 6,700 postsecondary schools received Basic Grants (BEOGs). *1979 Catalogue of Federal Domestic Assistance*, Executive Office of the President, Office of Management and Budget, U.S. Government Printing Office, Washington, D.C. 320. The SEOG program operates on a smaller scale, with approximately $340,100,000 in grants obligated in fiscal year 1979, providing assistance to some 573,000 students. *Id.* at 258.

institutions which in essence constitute general support for their operations. The funds may be used to pay teacher and administrative salaries, build teacher lounges, administration offices and facilities and the like. A finding that the 1972 Congress did not intend to prohibit these federal funds from being used to support employment discrimination flies in the face of Congress' own stated purposes and goals not only in enacting Title IX, but also in its other actions and statements throughout that legislative session.

It defies simple logic to conclude, as did the court below, that the Congress would have amended Title VII and the Equal Pay Act to cover employment discrimination in schools, declared its concern about the especially grave problems of sex discrimination in employment in schools, passed federal funding statutes naming teachers as well as students as the beneficiaries of the funds, yet excluded employees from protection against discrimination in the use of federal funds. In short, simple logic, as well as the plain meaning of the statute which contains no employment exemption, support the inclusion of employment discrimination within Title IX.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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